# STATE OF MICHIGAN

# COURT OF APPEALS

SHAWN GOLSON,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 1, 2005

No. 251302
Wayne Circuit Court
LC No. 02-223858-CK

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Plaintiff Shawn Golson appeals as of right from orders setting aside a default, and granting summary disposition to plaintiff's insurer, defendant Allstate Insurance Company. We affirm in part and reverse in part. We decide this case without oral argument pursuant to MCR 7.214(E).

## I. Basic Facts and Procedural History

Golson reported her car stolen on or about February 20, 2002. She filed a claim with Allstate in the matter, but the latter refused coverage on the ground that Golson's policy had lapsed because of her failure to pay the premiums. Golson commenced action on July 11, 2002, asserting that she had paid premiums as required, and that Allstate had not timely notified her of any policy cancellation. Allstate failed to answer the complaint in the required time, and a default was entered on August 22, 2002. Allstate persuaded the trial court to set aside the default and, later, to grant its motion for summary disposition.

## II. Setting Aside Default Judgment

### A. Standard of Review

We review the trial court's decision on a motion to set aside a default for an abuse of discretion.[1]

[1] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

B. Good Cause And Meritorious Defense

Golson argues that the trial court abused its discretion in setting aside the default judgment. Generally, other than in cases of improper jurisdiction, a motion to set aside a default judgment may be granted only if (1) good cause is shown,[2] and (2) the moving party properly files an affidavit supporting a meritorious defense.[3] The good cause prong of the analysis may be satisfied upon the trial court's finding that either: (1) a substantial irregularity or defect was present in the proceeding on which the default is based; or (2) there was a reasonable excuse for failure to comply with the requirements that created the default.[4] Further, if the moving party offers a meritorious defense that would be absolute if proved, a lesser showing of "good cause" will be required then if the defense were weaker, in order to prevent manifest injustice.[5] Accordingly, while the good cause and meritorious defense elements of a motion to set aside default judgment should *initially* be considered separately,[6] a determination that a meritorious defense would be absolute if proven necessarily colors a trial court's decision regarding the presence of good cause for a failure to make a timely response to a complaint. This appears to have been the trial court's reasoning here, based on its statement that it would "find good cause in the meritorious defense."

"[T]he mere existence of negligence does not preclude a finding of good cause."[7] Indeed, the first of the five specific grounds for providing relief from a judgment is "[m]istake, inadvertence, surprise, or excusable neglect . . . ."[8] Moreover, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default to stand would result in manifest injustice."[9] Finally, we note that the rule authorizes relief for "[a]ny other reason justifying relief from the operation of judgment."[10] This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment.

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[2] *Huggins v Bohman*, 228 Mich App 84; 578 NW2d 326 (1998).

[3] *Alken-Ziegler, Inc, supra* at 219.

[4] *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90; 666 NW2d 623 (2003).

[5] *Alken-Ziegler, Inc, supra* at 233-34 (noting that "manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule").

[6] *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544; 620 NW2d 646 (2001).

[7] *Huggins, supra* at 88 (citing *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989)).

[8] MCR 2.612(C)(1)(a).

[9] *Huggins, supra* at 88 (citing *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996)).

[10] MCR 2.612(C)(1)(f).

For these reasons, we conclude that it was not an abuse of discretion for the trial court to find that the moving party satisfied the good cause prong of the analysis, even in the case of an agent inadvertently misplacing a complaint. Rather, this lesser showing of good cause is sufficient when, as seen in this case, the trial court finds that a manifest injustice could result from the default judgment in light of the likely existence of a meritorious defense.

## III. Summary Disposition

### A. Standard Of Review

We review de novo the trial court's decision on a motion for summary disposition, as well as all other issues of law.[11]

### B. Legal Standards

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim.[12] We consider the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party.[13] "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[14]

### C. Applying The Standards

The parties do not dispute that MCL 500.1511(2) applies in this situation: "Not less than 10 days' written notice shall be mailed to the insured of the intent of the premium finance company to cancel the insurance contract unless the default is cured within the 10-day period." Golson asserts that no such notice was sent in this instance, and thus that any gap in her payments of premiums was nonetheless covered for that reason.

Allstate submitted, with its motion, reproductions of a document, dated January 29, 2002, listing Golson as among the people who were sent cancellation notices, followed by a cancellation notice with Golson's address, announcing a cancel date of February 16, 2002. Two pages later, there is a notice to Golson that her policy was cancelled effective February 16, 2002, but reinstated on February 22, 2002, in response to a recent payment.

Where the moving party has produced evidence in support of the motion, the opposing party bears the burden of producing evidence to establish that a genuine issue of disputed fact

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[11] *Koenig v South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999).

[12] *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001).

[13] *Id.*

[14] *Id.*

exists.[15] In this case, Golson responded to Allstate's motion with the assertion that no cancellation notice was sent, and pointed to deposition testimony of Allstate's claims adjuster where the latter identified Golson's complete file, admitted that no indication of any cancellation notice was to be found in the file, and indicated that he thought that Allstate preferred that proof of written cancellations be kept with the claim file. However, the adjuster added that he could not conclude from the absence of such indication in this instance that no cancellation notice had been sent.

The question, then, is whether Golson offered enough evidence to suggest that notice of cancellation had not been sent to create a question of fact in the face of Allstate's documentation suggesting that it had. In deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility."[16] Golson asserted that Allstate's documents were created after Allstate's adjuster testified on deposition about the lack of indication in Golson's file that any cancellation notice was sent. Although the adjuster did equivocate over the conclusion that may be drawn from the lack of such indication, he did make clear that company policy was to put all pertinent claim information into the appropriate claim file. The adjuster's admission that Golson's file included no indication that cancellation notice was sent, along with Golson's own protestations that none was ever received and with Golson's plausible theory impeaching Allstate's documentation, create an issue of fact for resolution at trial. For these reasons, we conclude that the trial court erred in granting summary disposition.

Affirmed in part and reversed in part.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen

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[15] *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (citing MCR 2.116(G)(4)).

[16] *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).